CIRCUIT COURT OF THE UNITED STATES.

(WESTERN DISTRICT OF VIRGINIA.)

LEWIS W. COX v. J. FRANK GILMER AND OTHERS.

April 30, 1898.

1. FEDERAL JURISDICTION. In order to give the Circuit Courts of the United States jurisdiction of controversies between citizens of the same State, on the ground that a Federal question is involved, it must appear from the declaration, or other statement of the plaintiff's case, that the claim is one arising under the Constitution, laws or treaties of the United States; and, if not so appearing, the defect cannot be cured by allegations introduced by subsequent pleadings.

2. FEDERAL JURISDICTION. Where the declaration alleges that the plaintiff was arrested under color of a statute of the State, and that such statute is repugnant to the Constitution of the United States, a proper case for the jurisdiction of the Circuit Court of the United States is stated, though plaintiff and defendants are citizens of the same State.

3. DUE PROCESS OF LAW. A State statute which authorizes the arrest of a person on a criminal charge, without a warrant, is not antagonistic to that provision of the United States Constitution which prohibits any State from depriving any person of life, liberty or property without due process of law.

4. VIRGINIA ELECTION LAW. The Act of the General Assembly of Virginia, approved March 5, 1890, authorizing judges of an election to order the arrest of any person creating a disturbance at the polls, construed, and held not to be repugnant to the Federal Constitution.

Action of trespass against J. Frank Gilmer, Samuel McCue and Percy F. Payne, to recover damages for false imprisonment. The declaration alleges that during the progress of an election being held in the city of Charlottesville, Va., plaintiff was arrested upon the complaint of defendant, Gilmer, under a certain paper signed by a majority of the judges of said election, issued by authority of an act of the General Assembly, approved March 5, 1890, on the charge that plaintiff was creating a disturbance at the polls. That the arrest was made by defendant Payne, as constable, and that a preliminary hearing was had before defendant McCue, mayor of the city, who refused to hear the case on its merits or to grant bail, but committed plaintiff to jail, where he remained for thirty hours, at the expiration of which time he was tried and acquitted of the charge. Copies of the warrant and *mittimus* are set out at large in the declaration. The declaration

is in the usual form, with proper allegations of malice and want of probable cause.

The declaration contains also the following allegation:

" . . . . That the said defendants committed the trespass against the said plaintiff hereinbefore complained of under color of the authority of the act of the General Assembly of Virginia, approved March 5th, 1890, which is in the words and figures following, to-wit:

"'Be it enacted by the General Assembly of Virginia, That the judges of election, if it shall appear that the voters are being intimidated or coerced from any source in the exercise of their suffrage by by-standers about the polling place, or that voters are being hindered or tampered with in any way so as to prevent the casting of a secret ballot, may order such person, or persons, so engaged in intimidating, coercing, or tampering with voters, to cease such action, and if such person, or persons, so engaged do not forthwith desist, the judges of election, or a majority of them, may order the arrest of such person, or persons, by a constable, or any other person authorized by law to make such arrest, and confine him, or them, in the county, or city, jail, as the case may be, not exceeding 24 hours, and such person, or persons, may be summoned by due process of law before the next term of the county, or corporation, court having jurisdiction, as the case may be, and upon the production of evidence proving his, or her, guilt, shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars.'

" . . . . which act is repugnant to the Constitution of the United States and invalid for the following reasons, to-wit: In that it deprives a person of his liberty without due process of law, punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by jury."

All the parties, both plaintiff and defendants, are citizens of the State of Virginia.

John E. Roller and *Turner A. Hackman,* for the plaintiff.

Sipe & Harris and *George W. Morris,* for the defendants.

PAUL, District Judge [after stating the facts in detail], delivered the opinion of the court.

The defendants demur to the declaration and move the court to dismiss the case on the ground that this court has no jurisdiction of the same, the plaintiff and the defendants being citizens of the same State.

The plaintiff contends that though the parties are all citizens of Virginia, yet this court has jurisdiction of this action because a Federal question is involved. The Federal question, as alleged in the declaration, is that the Virginia statute under color of which the defendants acted in securing the arrest and imprisonment of the plaintiff is in violation of the Fourteenth Amendment to the Constitution of the

United States. The clause of the Fourteenth Amendment which, it is alleged, the Virginia statute of March 5, 1890, violates is the second clause of section one, which is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The declaration, after stating at length the plaintiff's cause of action, which is an action for false and illegal imprisonment, alleges "that the said defendants committed the trespass against the said plaintiff hereinbefore complained of under color of the authority of an act of the General Assembly of Virginia, approved March 5, 1890," and recites the same. The declaration continues: "Which act is repugnant to the Constitution of the United States and invalid for the following reasons, towit: In that it deprives a person of his liberty without due process of law, punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by jury."

The first ground of demurrer urged by the defendants is that the plaintiff, after stating his cause of action, goes further and anticipates the defense that will be relied on by the defendants, that is, that they were proceeding under the act of the General Assembly of Virginia of March 5, 1890, that the plaintiff thus attempts to confer jurisdiction on this court by alleging that the defense which will be relied on involves a Federal question. Counsel for defendants in support of this position cite as a leading case *Tennessee* v. *Union and Planters Bank*, 152 U. S. 454. This was a suit brought by the State of Tennessee against the Union and Planters Bank to recover taxes assessed by the State on the capital stock of the bank, and on shares of stock held by the stockholders of said bank, and in the bill it was alleged that the bank claimed exemption from such taxation under its charter, and that the act assessing it with taxes was in violation of the Constitution of the United States in that it impaired the obligation of a contract, the charter of the bank exempting it from the payment of taxes so assessed. In that case the Supreme Court held, as it had previously done in *Metcalf* v. *Watertown*, 128 U. S. 586: "Where, however, the original jurisdiction of a Circuit Court of United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases,

that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleadings, must dismiss the suit, just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind." The same doctrine is held in *Rush* v. *Mining Company*, 150 U. S. 138.

In *Chappell* v. *Waterworth*, 155 U. S. 102, the Supreme Court held that "under the acts of March 3, 1887, chapter 373 (24 Stat. 552), and August 13, 1888, chapter 866 (25 Stat. 433), a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a State court into the Circuit Court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings." In accordance with this decision are the cases of *Land Co.* v. *Brown*, 155 U. S. 488; *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482; *Railroad Co.* v. *Skottowe*, 162 U. S. 490; *Kansas* v. *Atchison, T. & S. F. Ry. Co.*, 77 Fed. 339.

But it is contended for the plaintiff that the statement of his cause of action does not bring his case within the doctrine established by these decisions; that in the statement of his case he does not anticipate the defense that will be relied on by the defendants for the purpose of raising a Federal question so as to give this court jurisdiction. Counsel for the plaintiff insist that this case is covered by the decision of the Supreme Court in *White* v. *Greenhow*, 114 U. S. 307. In that case both the plaintiff and the defendant were citizens of the State of Virginia. It was an action brought in the Circuit Court for the Eastern District of Virginia by a tax-payer who had tendered to the tax-collector in payment of his taxes coupons cut from the bonds of the State, which coupons were by an act of the General Assembly of Virginia of March 30, 1871, receivable in payment of taxes by virtue of a contract with the State of Virginia. The declaration alleged that the defendant refused to receive the said coupons under color of the

authority of the act of the General Assembly of the State of Virginia, passed January 26, 1882, which forbade him to receive the same; that the defendant after refusal of said tender forcibly and unlawfully entered on the premises of the plaintiff and levied upon and seized and carried away the personal property of the plaintiff in order to sell the same for the satisfaction of said taxes, which he claimed to be unpaid and delinquent; that the acts of the General Assembly of Virginia specified in the pleadings, which require the tax collector to refuse to receive such coupons in payment of taxes and to proceed with the collection of taxes for the payment of which they have been tendered as if they were delinquent, impair the obligation of the said contract between the State of Virginia and the plaintiff.

The declaration was demurred to and the demurrer was sustained by the Circuit Court, but overruled by the Supreme Court. The Supreme Court saying: "The present action, as shown on the face of the declaration, was a case arising under the Constitution of the United States, and was one, therefore, of which the Circuit Court had rightful jurisdiction."

In that case the cause of action was the seizure of the plaintiff's property under color of an act of the General Assembly of Virginia which impaired the obligation of a contract, and was in violation of the Constitution of the United States. In the case at bar the cause of action alleged is the arrest and imprisonment of the plaintiff by the defendants under color of an act of the General Assembly of Virginia which, it is asserted, "is repugnant to the Constitution of the United States and invalid in this, to-wit: that it deprives a person of his liberty without due process of law, punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by jury."

The court is unable to draw any distinction between the averments in the declaration in *White* v. *Greenhow, supra,* and the averments in the declaration in the case we are now considering. In each case the injuries complained of are alleged to be the direct result of the operation of a legislative act that is repugnant to the Constitution of the United States. The plaintiff in this case does not, as contended by counsel for the defendants, allege or suggest that the defendants will set up by way of a defence a claim that they acted under the Constitution or laws of the United States, in order to raise a Federal question, of which this court would have jurisdiction. The doctrine established by the decisions in *Tennessee* v. *The Union and Planters Bank* and in the

other cases cited *supra*, is not applicable here. If the act of the General Assembly of Virginia, approved March 5, 1890, is in violation of the Constitution of the United States, the cause of action is properly stated by the averments in the declaration, and these would be sufficient to give this court jurisdiction.

This conclusion requires an examination of the question whether the act of the General Assembly of Virginia, approved March 5, 1890, is antagonistic to the Constitution of the United States.

The particulars wherein it is alleged in the declaration that the act in question is repugnant to the Constitution of the United States are: "It deprives a person of his liberty without due process of law, punishes a citizen without a trial, without a proper warrant for his arrest, and without a trial by a jury." The court, in discussing this act of the Virginia legislature will necessarily confine itself to the question of its constitutionality. It has no concern with the facts connected with the arrest and imprisonment of the plaintiff. The power conferred by the statute may or may not have been abused in this instance by the officials acting under it. They may have exceeded the power conferred by the statute and applied it to acts of the plaintiff which were not comprehended by its provisions. Wrongful acts by an offiical cannot affect the validity of the law under which the proceedings are taken.

The clause of the Fourteenth Amendment which the counsel for the plaintiff insist is violated by the act in question, and to which the argument for the plaintiff is confined, is as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In *Walker* v. *Sauvinet*, 92 U. S. 90, the Supreme Court says: "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under authority of the United States. Art. VI, Const."

The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." In *Hurtado* v. *California*, 110 U. S. 516, Mr. Justice Matthews, referring to the provisions of the Fifth Amendment, says: "Due process of law in the latter (Fifth Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised

within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

In accordance with the doctrine stated in the foregoing cases, it was held in *Hurtado* v. *California*, *supra* (syllabus), "That a conviction upon such an information for murder in the first degree and a sentence of death thereon are not illegal by virtue of that clause of the Fourteenth Amendment to the Constitution of the United States, which prohibits the States from depriving any person of life, liberty, or property without due process of law."

In *Walker* v. *Sauvinet*, *supra*, it was held that a State statute dispensing with a trial by jury in a case at common law is not in violation of the Fourteenth Amendment to the Constitution; and this notwithstanding that by article seven of the Amendments it is provided that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In *Miller* v. *Texas*, 153 U. S. 535, which was a case brought up on a writ of error from the criminal court of appeals for the State of Texas, the Supreme Court used this language: "In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and even if he were, it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in State courts." Citing *Barron* v. *Baltimore*, 7 Pet. 243, a leading case, and other decisions.

"Officers who by virtue of their offices are conservators of the peace have, at common law, the right to arrest without warrant all persons

who are guilty of a breach of the peace, or other violation of criminal law, in their presence." Davis' Crim. Law, 402; *Muscoe* v. *Commonwealth*, 86 Va. 443; 2 Amer. & Eng. Ency. of Law, 2d Ed., 881; *Carico* v. *Wilmore*, 51 Fed. 196.

The judges of election in Virginia are, by the act of 5th March, 1890, made conservators of the peace for the purpose of preserving order at elections, as they were, and still are, by the provisions of section 144 of the Code of 1887. The act complained of is a general law, applicable alike to all citizens of the Commonwealth. The particulars wherein it is claimed that it deprives a person of his liberty without due process of law, are:

First. That it punishes a citizen without a trial.

The act does not confer upon the judges of election the power to inflict punishment. It confers upon the judges of election the authority, where a person is in their judgment violating the provisions of the statute, after he has been ordered to cease such action and he refuses to desist, to order his arrest and to commit him for a time not exceeding twenty-four hours. The act further provides that such person may by due process of law be summoned before the next term of the county or corporation court having jurisdiction and, on proof of his guilt, he may be fined as the act provides. This is the trial provided by the act, and the Constitution of the State of Virginia guarantees him a trial by jury.

Second. As to the objection to the statute that it deprives a person of his liberty without a proper warrant for his arrest, we have seen from the case of *Miller* v. *Texas*, *supra*, that a State statute which provides that a person may be arrested on a criminal charge without a warrant is not antagonistic to the Constitution of the United States. The act of March 5, 1890, passed by the Virginia legislature, contains no such provision. As a matter of fact, a warrant of arrest was issued in this case.

The act of the Virginia legislature of March 5, 1890, empowers the judges of election, under certain conditions, to order an arrest; and whether we construe the statute as authorizing the arrest with or without a warrant, it does not, in view of the authorities cited, present a Federal question which confers jurisdiction on this court. This disposes of all the grounds upon which its jurisdiction is invoked. None of them are tenable.

The demurrer will be sustained.